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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No.

INTERNATIONAL HARVESTER COMPANY; PHILLIPS PETROLEUM COMPANY; DE LUXE CHECK PRINTERS, INCORPORATED; *et als., Petitioners,*

v.

THE CITY OF KANSAS CITY, KANSAS; ROBERT J. FOSTER, County Attorney of Wyandotte County, Kansas; JAMES L. CONROY, County Clerk of Wyandotte County, Kansas; *et al.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

INTERNATIONAL HARVESTER COMPANY and others, your petitioners, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit, entered in the above-entitled case on August 15, 1962.

OPINIONS BELOW

The opinion of the district court (R. 39-45) is not reported. The opinion of the court of appeals (Appendix A, *infra,* pp. A1-A7) has not yet been reported.

JURISDICTION

The judgment of the court below (Appendix B(1), *infra,* p. A8) was entered on August 15, 1962. A timely petition for rehearing was denied on September 11, 1962 (Appendix B(2), *infra,* p. A8). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

In a State court *quo warranto* proceeding challenging the legality of municipal annexation ordinances, the State Attorney General was permitted to intervene in and then to dismiss that proceeding as a matter of absolute right, although it was the only one in which such legality could be judicially determined, and although such dismissal was not rested on any lack of merit in the proceeding. Petitioners, property owners in the area sought to be annexed, were denied leave to intervene, over their assertion that they would be denied due process and the equal protection of the laws in violation of the Fourteenth Amendment if they were refused the right to challenge, or to have challenged on their behalf, the legality of municipal ordinances purporting to annex their property so as to make it subject to the taxing power of the municipality. Thereafter petitioners, making the same challenge and the same Federal constitutional contentions in a Federal district court, other Federal jurisdictional prerequisites being present, were held

not to present any justiciable issues and to lack standing to sue.

The questions presented are:

1. Whether, when Federal constitutional claims cannot be asserted and adjudicated in a State court, because of lack of standing as a matter of State law, such claims can then be asserted or adjudicated in a Federal court; or whether, as held by the court below, petitioners' Federal constitutional claims cannot be heard anywhere.

2. Whether, after municipal annexation ordinances have been held invalid for noncompliance with State law, property owners who would be adversely affected by additional and similar annexation ordinances are denied the equal protection of the laws when all possibility of judicial determination of any challenge to the further ordinances is summarily cut off by the admittedly arbitrary action of State officers in dismissing such challenge on grounds not going to the legal merits thereof.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

1. The Due Process and Equal Protection clauses of the Fourteenth Amendment to the Constitution of the United States are sufficiently familiar to the Court as not to require quotation.

2. The Kansas statutes on which petitioners ultimately rely are not involved in the present juncture of the case, where standing to sue rather than the merits is alone in issue.

STATEMENT

This case involves a second effort on petitioners' part to obtain a judicial hearing on and a determination of their claims under the Fourteenth Amendment to the Constitution of the United States.

First action. Petitioners' first effort to have their Federal claims adjudicated was made in an original proceeding in the Supreme Court of Kansas, which this Court declined to review (No. 909, Oct. T. 1959). The record in that case, which is therefore within the scope of judicial notice (*United States* v. *Pink*, 315 U.S. 203, 216; *National Fire Ins. Co.* v. *Thompson*, 281 U.S. 331, 336-337), may be summarized as follows:

For a number of years, the City of Kansas City, Kansas, has sought to annex parts of the Fairfax Industrial District in Quindaro Township, Wyandotte County, Kansas, in which is located property, both real and personal, belonging to the present petitioners as well as to some others.[1]

The first two such attempts made by Kansas City failed, when its annexation ordinances were held to be invalid and unlawful because not within the authority delegated by the legislature to the city. *State ex rel. Fatzer* v. *City of Kansas City*, 169 Kan. 702, 222 P. 2d 714; *State ex rel. Martin* v. *City of Kansas City*, 181 Kan. 870, 317 P. 2d 806.

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[1] Two of the present petitioners, Phillips Petroleum Company and Sealbright-Oswego Falls Corporation, were also petitioners in the earlier case. The other petitioners here, International Harvester Company; DeLuxe Check Printers, Incorporated; Sunshine Biscuit Company, Inc.; and Jones & Laughlin Steel Corporation, were not parties to the Kansas proceeding. Two of the petitioners in the first action, Girten Investment Company and Union Pacific Railroad Company, are not parties to the present proceeding.

Thereafter Kansas City adopted six additional ordinances purporting to annex portions of the Fairfax Industrial District, wherein was located property belonging to the petitioners. On the relation of the then County Attorney of Wyandotte County, *quo warranto* proceedings similar in every respect to those already cited were once more instituted. Kansas City and its officials answered, admitting the illegality of two of the six challenged ordinances, but joining issue on the balance. In accordance with its practice, the Supreme Court of Kansas referred the case to a Commissioner for the taking of testimony.

Thereafter the Attorney General of Kansas, who had initiated the first of the earlier cases, but had participated neither in the second nor in this one, filed a motion to intervene, to supersede the county attorney as relator, to strike all pleadings filed by Quindaro Township on the ground that it had no justiciable interest in the controversy, and to dismiss the *quo warranto* proceeding. The sole ground set forth in support of the motion to dismiss was that, in view of the expense of the prior litigation incurred in connection with the two prior attempts at annexation (both of which had been held illegal), it would not be in the public interest to continue the action in which the third challenge was asserted. The Attorney General's motion did not assert any lack of merit in the proceedings.[2]

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[2] As summarized in the opinion of the Supreme Court of Kansas (*State ex rel. Foster* v. *City of Kansas City*, 186 Kan. at 192, 350 P. 2d at 39), "The attorney general further moved that in view of the expense to the taxpayers of past litigation on this annexation problem of the city, it would be in the public interest to terminate and dismiss the present action."

The Attorney General himself had said in his motion (Tr. 78, No. 909, Oct. T. 1959): "• • • that during the pendency of this

The then Governor of Kansas formally directed the Attorney General to proceed with the case in order that substantial rights should not be forfeited without a hearing. The County Attorney, after being served with copies of the Attorney General's motion, specifically noted that he had no objection to his own supersession.[3]

At this juncture the several individual petitioners, who until then had considered their interests to be adequately represented by the County Attorney, filed applications to intervene. In those applications, they alleged that, if the disputed ordinances were permitted to go into effect, petitioners would be subjected to the burden of city taxes, regulation and control, and that to permit the permanent frustration of a judicial determination of the question of the validity of the ordinances would involve a denial of due process of law under the Fourteenth Amendment. Petitioners further alleged that granting the Attorney General the unlimited power to decide whether private

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action and until completion thereof, were such action not dismissed, the interest of the citizens and taxpayers of the area involved have been and would be put to inconvenience and expense in the handling of the governmental affairs of the city including, but not limited to, tax levies, assessments and collections; that on several previous occasions and over a long period of years, litigation has been carried on over attempts to settle the annexation problems of Kansas City, Kansas, attendant to the Fairfax industrial area and it is in the public interest that this action should be terminated; • • •."

[3] The Attorney General had filed a single "Motion to Supersede, Strike from the Files and Dismiss" (Tr. 77-79, No. 909, Oct. T. 1959). The County Attorney's consent to supersession, quoted by the Supreme Court of Kansas, *supra*, 186 Kan. at 192, 350 P. 2d at 39), was contained in his acknowledgment of service of that motion (Tr. 80, No. 909, Oct. T. 1959).

rights would be made the subject of judicial determination would involve a denial of the equal protection of the laws under the same Amendment. Petitioners accordingly asked that the Attorney General be compelled to continue the action to a decision on the merits, or, alternatively, that petitioners be themselves permitted to continue the action as relators in order that their own rights might be judicially determined.[4]

The Supreme Court of Kansas denied petitioners' application to intervene, on the ground that under State law a proceeding challenging an annexation ordinance could only be maintained on the relation of a County Attorney or of the Attorney General, citing *Smith* v. *City of Emporia,* 168 Kan. 187, 211 P. 2d 101; that Quindaro Township had no authority to continue the action on its own behalf; that the Attorney General had power both to supersede the County Attorney and thereupon immediately to dismiss the actions; and that the Governor's directions to the contrary were unavailing, because the Attorney General was a member of the judicial department of the State and hence independent of executive direction. *State ex rel. Foster* v. *City of Kansas City,* 186 Kan. 190, 350 P. 2d 37.

Petitioners thereupon sought certiorari here. The then Governor of Kansas, the Hon. George Docking, moved for leave to file a brief *amicus curiae,* in the course of which he said (p. 5):

> "The true interests of the State of Kansas lie in the observance of fair play and in the preserva-

[4] The four petitions in intervention extend over Tr. 88-179 of the record in No. 909, Oct. T. 1959. Paragraph 11 of each petition, in which the Federal contentions are asserted, appears at Tr. 94, 113, 147-148, 167-168.

tion of the principle that no citizen should be denied the right to a full and fair hearing before an impartial tribunal on his contention that his interests are threatened by official action that has no warrant in law."

Governor Docking's motion for leave to file was granted, but the petition for certiorari was denied (363 U.S. 831; No. 909, Oct. T. 1959), on June 20, 1960.

Second action. The present action was filed in the United States District Court for the District of Kansas on March 1, 1961.

The plaintiffs were two of the unsuccessful applicants for intervention in the earlier proceeding, plus four others, all of them property owners in the Fairfax Industrial District (Cmplt., ¶¶ 1, 13; R. 1-2, 6); the defendants were the City of Kansas City, and the County Attorney, County Clerk, and Board of County Commissioners of Wyandotte County (Cmplt., ¶ 2; R. 2).

Jurisdiction was rested both on diversity and on a Federal question, viz., denial of rights guaranteed by the Fourteenth Amendment (Cmplt., ¶¶ 3-4; R. 2).

The complaint asserted the illegality of the six annexation ordinances (Cmplt., ¶¶ 5-12; R. 2-6), alleged plaintiffs' exhaustion of all administrative remedies, including demand on the proper officials to seek a determination of the validity of the ordinances (Cmplt., ¶ 14; R. 6), and alleged further the inadequacy of all other legal remedies (Cmplt., ¶ 15; R. 7).

It was averred that, if Kansas law provides plaintiffs no means for obtaining any adjudication of the

validity of the ordinances involved, then plaintiffs have been deprived of due process and of the equal protection of the laws (Cmplt., ¶ 16; R. 7); and that the same deprivation would follow if the County Attorney were not required to protect plaintiffs' rights and privileges (Cmplt., ¶ 19; R. 8).

Plaintiffs sought (R. 9) a declaratory judgment that the ordinances were severally invalid, an injunction against their enforcement, and a judgment directing the defendant County Attorney to institute a *quo warranto* action.

Three of the defendants filed answers (R. 33-38). The City of Kansas City then moved for judgment on the pleadings (R. 38), a document that the district court treated as a motion to dismiss (R. 40).

The latter tribunal (Circuit Judge Hill, sitting by designation) held that the action could not be maintained, in part because no citizen could question illegal annexation under Kansas law, in part because there is no standing to question legislative annexations (under the doctrine of *Hunter* v. *Pittsburgh,* 207 U.S. 161); and because municipal annexations, unchallenged by public officials or by the legislature, must be deemed to have the sanction of legislative annexations, apparently by a species of ratification (R. 39-45). Accordingly, the complaint was dismissed (R. 45-46).

On appeal (R. 46-48), the court below affirmed. It held that petitioners had no capacity to sue under Kansas law; that even the duly alleged arbitrary refusal of the County Attorney to institute a *quo warranto* proceeding made no difference in that regard; that annexation ordinances do not present

Federal questions except in cases of abuse such as *Gomillion* v. *Lightfoot,* 364 U.S. 339; and that (Appendix A, p. A7, *infra*) "Neither the due process clause nor the concept of equal protection is available to persons seeking to obstruct the ordinary and necessary exercise of a state's political functions."

REASONS FOR GRANTING THE WRIT

In this case, petitioners have been denied any opportunity for a hearing on Federal constitutional claims, claims that, as will be pointed out, are in no sense unsubstantial. Their original contention, clearly enough, was one made under State law, to the effect that certain annexation ordinances, pursuant to which their property would be subjected to taxation and regulations, were invalid because not adopted in conformity with the power delegated to the municipality by the State. That contention was in process of being adjudicated in a proceeding brought on the relation of the cognizant County Attorney. When the State Attorney General then undertook to supersede the relator and to dismiss the proceeding, on a ground not going to the merits, petitioners sought to intervene, alleging that to permit such a dismissal would deprive them of due process and of equal protection in violation of the Fourteenth Amendment: of due process because depriving them of its minimal requirement that one whose property is to be taken shall have the right to be heard as to the validity of the taking, of equal protection because depriving them of a remedy available to others similarly situated, and of which others on two similar and prior occasions had had the benefit.

The Supreme Court of Kansas, which granted the Attorney General's motion to supersede and to dismiss

and simultaneously denied petitioners' application to intervene, effectually closed the State courts to an adjudication of the Federal issues that they tendered. This Court's denial of certiorari, plainly enough, did not amount either to affirmance or approval of that decision. Now, however, the Federal courts have also refused to hear petitioners' contentions under the Federal Constitution, in a proceeding otherwise within Federal jurisdiction, relying basically on the State law that denied petitioners' access to the State courts.

The result is that petitioners have been denied a hearing in any forum on their Federal claims. We submit that this involves a palpable violation of Federal due process, one that cannot be justified or supported by any generalizations drawn out of the context of earlier annexation cases, particularly as those generalizations were later shown to be limited (*Gomillion* v. *Lightfoot,* 364 U.S. 339, 342-343).

First. The very essence of Due Process of Law, its irreducible minimum, is the right to a hearing. Consequently, where a State does not provide either a forum or a procedure for the hearing of a contention that is based on the Constitution of the United States, the Federal courts are open for its consideration. As this Court said in *Young* v. *Ragen,* 337 U.S. 235, 238, "But it is not simply a question of state procedure when a state court of last resort closes the door to *any* consideration of a claim of denial of a federal right." (Italics in original.) And of course it is well settled that whatever limitations a State may properly impose, in respect of the tribunals in or procedures pursuant to which particular claims may be asserted, cannot limit the power or competence of a Federal court to entertain such claims where, as here, the requisites

of Federal jurisdiction are otherwise present. See, out of many decisions, *Railway Company* v. *Whitton*, 13 Wall. 270, 286; *Suydam* v. *Broadnax*, 14 Pet. 67; *Hyde* v. *Stone*, 20 How. 170; *Clark* v. *Bever*, 139 U.S. 96; *Chicot County* v. *Sherwood*, 148 U.S. 529.

Here, as in *Brinkerhoff-Faris Co.* v. *Hill*, 281 U.S. 673, petitioners have been denied due process of law, using that term in its primary sense of an opportunity to be heard and to defend their substantive rights. Here, as in that case, petitioners have by judicial decision been deprived in two forums of any possibility of obtaining an adjudication of their contentions. And, since State remedial means have been shown to be inadequate, the Federal court is bound to entertain the action. Cf. *White* v. *Ragen*, 324 U.S. 760; *Young* v. *Ragen*, 337 U.S. 235, *supra*; 28 U.S.C. § 2254.

Second. Petitioners' Federal claims are substantial. The consequence of the two decisions here involved is that petitioners have been completely deprived of a remedy available to others similarly situated. Under Kansas law, the validity of municipal ordinances purporting to annex property and to subject it to the municipality's taxing power is traditionally tested by *quo warranto* brought by public officers; and indeed, as has been seen, two prior Kansas City annexation ordinances were held invalid in just such proceedings. *State ex rel. Fatzer* v. *Kansas City*, 169 Kan. 702, 222 P. 2d 714; *State ex rel. Martin* v. *Kansas City*, 181 Kan. 870, 317 P. 2d 806. But in consequence of the State decision in the first action, and of the Federal ruling here, that remedy has been finally and conclusively rendered unavailable, not because any public official in the exercise of an informed discretion

has concluded that the contentions made against the additional six ordinances are frivolous, or untenable, or even that they are unlikely to prevail, but simply and solely on mere fiat (Cmplt., ¶¶ 14, 15; R. 6-7). The allegation that each of the six challenged ordinances is severally illegal (Cmplt., ¶¶ 5-13; R. 2-6) stands admitted by the motion to dismiss on which the present case was decided below (R. 38, 40). In these circumstances petitioners' allegation of arbitrary inaction on the part of the County Attorney (Cmplt., ¶ 15; R. 7) cannot, we submit, be dismissed "only as a bald conclusion" (Appendix A, *infra*, p. A5).

While, of course, the Equal Protection Clause permits classification based on any actual distinction germane to the basis of the classification, it cannot tolerate a distinction that places a premium on repetition of illegality, and that penalizes petitioners because they have been the near victims of illegality in the past. We submit that, consistent with the Equal Protection Clause, no valid classification can be made between persons who have twice previously been subjected to the attempted taking of their property by ordinances that the State's highest court has declared on challenge to be illegal, and persons who for the first time are subjected to the threat of similar ordinances that they believe to be similarly unlawful.

The action of the Attorney General and then of the County Attorney in denying petitioners any opportunity for judicial determination, *ex parte*, without any limitation on the range of their discretion, actually only by arbitrary *ipse dixit*, is itself a denial to them of any meaningful equality under the law.

Access to the courts may not thus be denied to some and granted to others in the unfettered discretion of a public official. Cf. *Cochran* v. *Kansas,* 316 U.S. 255.

Third. It will hardly be denied that to permit a municipality to impose taxes on petitioners without any authority in law would be a taking of property in violation of the due process clause. See *Cincinnati* v. *Louisville & Nash. R. R. Co.*, 223 U.S. 390, 400; *Portland Ry., Light & Power Co.* v. *City of Portland*, 181 Fed. 632 (C.C.D. Ore.), appeal dismissed, 218 U.S. 686. Yet if petitioners are denied any judicial determination of the legality of the challenged ordinances, they will be without a remedy when Kansas City takes their property by taxation pursuant to ordinances of annexation that the motion to dismiss in the present case has admitted to be illegal. For under Kansas law, the validity of a levy authorized pursuant to an illegal annexation ordinance may not be litigated in the statutory proceeding normally available to recover illegal taxes paid under protest. *Smith* v. *City of Prairie Village,* 175 Kan. 469, 264 P. 2d 1053.

True enough, if this had been a legislative annexation, petitioners could not be heard, *Hunter* v. *Pittsburgh,* 207 U.S. 161, there being here no constitutional deprivation by the act of annexation itself, as in *Gomillion* v. *Lightfoot,* 364 U.S. 339. But to speak of legislative annexation is to beg the question, for the validity of the ordinances here depends on whether they were passed as a proper exercise of delegated power. State law makes it crystal clear that Kansas municipalities do not have plenary legislative powers (*State* v. *Hannagan,* 161 Kan. 492, 498, 170 P. 2d 138, 142, and cases there cited), as indeed the two earlier Kansas City annexation cases demonstrated.

If the court below had determined that the several annexation ordinances were within the power legislatively delegated to the city, that would have ended the matter. Instead it held that the County Attorney had unreviewable power to prevent adjudication of that issue, leaving petitioners without remedy. More than that, by equating petitioners' efforts, to require public officers to seek an adjudication of legality in respect of challenged municipal ordinances, with "persons seeking to obstruct the ordinary and necessary exercise of a state's political functions" (Appendix A, *infra*, p. A7), the court below emphasized the distorted calculus underlying its decision.

In any event, the result reached below is plainly inconsistent with many decisions here, which hold that, even in an area where the State legislature has plenary authority, one whose rights are affected by a purported exercise of the delegated power, where the legislature makes only a limited and conditional grant, is entitled to a hearing as to the validity of that exercise. *Browning* v. *Hooper,* 269 U.S. 396, 405-406; *Embree* v. *Kansas City Road Dist.,* 240 U.S. 242, 247; *Londoner* v. *Denver,* 210 U.S. 373, 385-386; *Parsons* v. *District of Columbia,* 170 U.S. 45, 52; *Fallbrook Irrigation District* v. *Bradley,* 164 U.S. 112, 166-167, 174-175.

Thus the ruling now sought to be reviewed, which denies petitioners any opportunity for judicial determination as to whether the authority that purports to take their property is lawfully exercised, actually deprives them of minimal due process, because it denies them all opportunity to be heard on the questions that are admittedly decisive as to the validity of the taking.

Fourth. As we have said, this is not a *Hunter* v. *Pittsburgh* situation because no non-delegated legislation is involved. The court below said (Appendix A, *infra,* p. A6), that petitioners' "primary attack upon the validity of the Kansas City ordinance is limited to the claim that the ordinance violates state law." It is of course true that the merits of the underlying controversy depend entirely on State law. But the court below did not purport to decide the merits, and it quite ignored the gravamen of petitioners' complaint here, namely, that by being denied a hearing anywhere on their State law contentions, they are being deprived of Federal rights—the right to be heard, and the right to be free from a discrimination that lacks any rational basis. Here, as in *Reynolds* v. *Cochran,* 365 U.S. 525, denial of any opportunity to be heard on an issue of State law involves a denial of Federal right.

The Federal rights asserted by petitioners cannot, we submit, be verbalized away simply because, in the normal course, petitioners and those similarly situated must depend on public officials for vindication thereof. If, for instance, Alabama had adhered to the rule that the fixing of municipal boundaries could only be questioned in proceedings instituted by State or municipal law officers, when could the rights infringed by the annexation measure considered in *Gomillion* v. *Lightfoot* have been asserted? Certainly not before the Greek Kalends that Chief Judge Cardozo invoked (*Matter of People (Russian Reinsurance Co.),* 255 N.Y. 415, 422, 175 N.E. 114, 116)—if even then.

The present case is in no sense unique or unlikely to arise again. The number of municipal annexation proceedings has been steadily increasing, to such an extent that, both in 1960 and in 1961, the number of

annexing municipalities with a population of 5000 or more exceeded 700; this is, in each of those years, more than one out of every five municipal governments of that size in the entire country. See International City Managers' Ass'n, *The Municipal Year Book, 1961,* p. 57; *id., 1962,* p. 51.

Moreover, some eleven States, in addition to Kansas, currently adhere to the rule that private persons lack capacity to attack the fixing or extension of municipal boundaries; this is four more jurisdictions than were thus aligned only a decade ago. The cases are collected in 13 A.L.R. 2d 1279; 1 A.L.R. 2d Supp. Service (1960 issue) 942; 3 *id.* (1962 issue) 257.

The questions tendered by the present petition are therefore of significant public importance.

CONCLUSION

The right to be heard is fundamental to the concept of Due Process of Law. Its exercise cannot properly depend on the uncontrolled and uncontrollable whim of a public officer. This petition for a writ of certiorari should therefore be granted.

Respectfully submitted.

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OCTOBER 1962.